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ABSTRACT

This discussion summarizes the general principles that may be applied in determining the limits of free expression and proposes new criteria based on libertarian values. Among the general principles summarized are the bad-tendency test, the clear-and-present-danger test, the balancing test, the incitement test, and the hypothetical absolute test. A new theory of free speech, the rationality standard, can permit a wide scope of expression and yet can resist attrition by interpretation. This doctrine asserts that all advocacy warrants unqualified protection, unless it is presented in such a context that the listener does not have an opportunity to decide rationally whether or not to heed the speaker's appeal. Conditions to which this standard may be applied include mind control and subliminal advertising. (KS)

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A Rationality Standard for the First Amendment

by

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Introduction

This section will attempt to formulate the general standards for determining the permissible limits of free expression. Because these guidelines seek to distinguish speech which forfeits constitutional protection, they cut across special cases and seek to define the extent to which any dissenting opinion may be controlled. The question of determining the permissible limits of free speech has been the subject of several articles in recent years, including "The Fighting Words Doctrine: From Chaplinsky to Brown" by Franklyn S. Haiman (Iowa Journal of Speech, Fall 1972); "Free Speech Decisions and the Legal Process: The Judicial Opinion in Context" by Don R. LeDuc (The Quarterly Journal of Speech, October 1976); and "The Art of Implying More Than You Say" by Sherida Bush (Psychology Today, May 1977). In particular, LeDuc, while discussing the role a scholar should play in the "development of a freedom of expression doctrine in law" suggests:

> The typical lawyer is too immersed in day-to-day problems to gain a broader vision of the path free speech law should follow. Thus it seems up to the scholar not simply to follow

> legal techniques or a legal approach, but to use a synthesis of legal methodology and communication research techniques in perceptive fashion to develop a philosophy for the area of law of greatest concern to communication sholarship, that law defining rights in the vital process of communication.[1]

Thus, as the above quotation suggests, there is an increasing need for communication scholars to consider seriously the direction or "path" that free speech will take in the future. This paper will examine several contemporary speech standards including the Bad-Tendency, Clear and Present Danger, Balancing, Incitement, and Absolute tests: Both their strengths and weaknesses will be highlighted and supported by Supreme Court precedents.

Furthermore, a new theory of speech, a Rationality Standard, will be presented. This doctrine suggests that all advocacy warrants unqualified protection unless it is presented in such a context that the listener does not have an opportunity to rationally decide whether to heed the speaker's appeal.[2]

Finally, this paper in concluding will offer alternative means of redress through court litigation for those citizens who have grievances which fall under the purview of the Rationality Standard, but are presently precluded by the exclusive jurisdiction of the Federal Trade Commission; specifically, those grievances produced by deceptive advertising and subliminal manipulation: the usage of subliminal perception devices and unconscious indoctrination techniques.

Bad-Tendency Test

The Supreme Court initially formulated a First Amendment philosophy in the context of World War I indictments for disloyal and dangerous advocacy. These prosecutions, the first of their kind in over a century, were based on the Espionage Acts of 1917 and 1918. These statutes proscribed a variety of expression that was deemed inimical to the war effort. In their final form, the Espionage Acts prohibited (among other things):

> ...false reports or false statements with intent to interfere with the operation or success of the military or naval forces of the United States or to promote the success of its enemies...attempts to cause insubordination, disloyalty, mutiny, or refusal of duty in the military or naval forces ...attempts to obstruct the recruiting or enlistment services ...saying or doing anything with intent to obstruct the sale of United States bonds...uttering scurrilous or abusive language, or language intended to cause contempt, scorn, contumely, or disrepute as regards the form of government of the United States; or the Constitution; or the flag; or the uniform of the Army or Navy...words or acts supporting or favoring the cause of any country at war with us, or opposing the cause the United States.

Under the umbrella legislation, a motely collection of war protesters and radicals were prosecuted, few of whom posed the slightest danger to the war effort. Some of the prosecutions rivaled the theatre of the absurd. Mrs. Rose Pastor Stokes was indicted and convicted for declaring in a letter that "I am for the people and the government is for the profiteers". A farmer was imprisoned for using blasphemous and unpatriotic language at his dinner table in

the presence of two guests. Others were convicted for expressing pacifist views, for questioning the constitutionality of the draft, for profanity uttered in the heat of argument, for criticizing the YMCA and the Red Cross, and (under state law) for discouraging women for knitting socks for the troops.[3]

Efforts to control the so-called Bad-Tendency speech may tend to inhibit freedom of expression, and furthermore require wasteful and unnecessary policing measures. The standard employed by the Supreme Court for distinguishing constitutional utterances from those subject to the Espionage Acts was the Bad-Tendency Test. Under this doctrine, any speech which has a tendency, however remote, to evoke substantial evil, forfeits the right to constitutional protection. As the previous examples show, the test is so broad that it virtually repeals the First Amendment. The standard was not rejected in the calm of normalcy, and was used to evaluate state laws against subversive expression in the 1920's and 1930's. It was not until 1937, with the decision in Herndon v. Lowry, 301 US 242 (1937), that the Bad-Tendency Test was superseded by the Clear and Present Danger Rule.[4]

Clear and Present Danger Test

The Clear and Present Danger Standard was first enunciated by Justice Oliver Wendell Holmes in Schenk v. United States, 249 US 47 (1919), one of the World War I Espionage Act cases: "The question in every case in whether the words are used in such circumstances

and are of such a nature as to create a clear and present danger that they will bring about the substantive evils that Congress has the right to prevent." This guideline was not long lived, however; by the early 1950's it had been tacitly abandoned in favor of the Ad Hoc Balancing Test.[5]

The Clear and Present Danger Rule represents an improvement over the Bad-Tendency Test in that it requires the state to justify the restriction of freedom of speech by establishing a more direct link between utterance and illegal or dangerous conduct. Yet, it is hardly a potent instrument for safeguarding free speech.[6]

First, it fails to recognize that expression, even when it poses a clear and present danger of substantive evil, may merit protection. Free expression is bound to conflict with societal interests and should not automatically be forced into a subordinate position in view of its vital importance. Witness, for example, Daniel Ellsberg and the Pentagon Papers, Woodward and Bernstein and the Watergate affair, and finally Daniel Shorr and the CIA.

Second, the test is too vague. The phrase clear and present danger is subject to a variety of interpretations, and each word affords a wide latitude for subjective judgment. In difficult cases, this standard forces judges to rely on intuition.

Third, to effectively implement the test there must be a factual

determination of sort normally beyond the scope of judicial inquiry. It requires the prediction of individual and mass behavior, a difficult and sometimes impossible task that involves the sophisticated manipulation of a vast quantity of unreliable data.

Balancing Test

At its fringes, the Clear and Present Danger Rule touches upon another test which explicitly rejects any attempt at an *a priori* classification of speech. This is an Ad Hoc Balancing Test which, in each instance, involves a weighing of the value of self-expression the government seeks to restrict against the social objective preserved through such regulation. Justice Felix Frankfurter was the foremost advocate of the Balancing Standard, employed most frequently in cases involving the indirect infringement of free speech.

The Balancing Test also has some serious defects. First, it entails even more difficult factual investigation than the Clear and Present Danger Test, as both sides of the balance must be appraised.

Second, the standard may bias the judicial judgment in favor of the legislative decision, as Justice Frankfurter's opinions in First Amendment cases would indicate. First Amendment rights are generally asserted by the poor and minorities, while control is based on the broad interest in law and order. Yet the protection of such minorities from the tyranny of the majority is a major goal of the Constitution.

Third, the rule fails to specify the standards that should form the balancing procedure. Should the scales tip but a feather's weight in favor of the government to justify abridgement of speech or must the state sacisfy a more stringent requirement? Fourth, the standard makes the protection of free speech almost wholly dependent upon the attitudes of judges.

Fifth, the test confronts the judicial system with a different dilemma. Legitimate balancing would have to consider the possibility that the state could achieve its objectives through less restrictive means; yet it is extremely hard for the courts to discuss such potential legislation without encroaching upon the legislature's prerogatives or rendering advisory opinions.[7] Sixth, the Balancing Standard cannot afford police, prosecutors, other government officials or private citizens adequate notice of which rights must be protected and which may be overruled.

The Incitement Test

The most popular free speech standard today is the Incitement Test. As expressed in Brandenburg v. Ohio, 395 US 444 (1969): "The constitutional guarantees of free speech and free press do not permit a state to forbid or proscribe advocacy of the use of force or of law violations except for where such advocacy is directed to inciting or producing imminent lawless action and is likely to in-

cite or produce such action." The Incitement Standard is, in effect, a narrower and more precise restatement of the Clear and Present Danger Rule. As such, it is probably the best guideline yet employed by the court. Brandenburg offers the most extensive protection to date of individual rights against state and local prosecution. Nonetheless, it suffers from all the defects of the original doctrine, at least to some degree.

Absolute Test

An Absolute Test has never been an accepted standard as promulgated by a majority of the Supreme Court. Even for the primary advocates, Justice Black and Douglas, absolutist doctrine is still in an ill-defined state. It is based upon the premise that the founding fathers literally meant that the freedom of speech should not be abridged at all. Thus, it seeks to distinguish protected speech by "defining," rather than balancing. Certain types of expression, it argues, can be termed "speech" under the meaning of the First Amendment, and cannot be abridged. Other expression may be termed "action" and thereby subjected to some type of Balancing Test.

Thomas I. Emerson has extended and refined this formulation in an attempt to devise a First Amendment theory based upon the difference between speech and action, the definition of the words "law and

abridge," and the delineation of "those sectors of social activity which fall outside the area in which, under the basic theory, freedom of expression must be maintained."[8] Emerson undertakes a lengthy and elaborate analysis of the way in which application of these principles would alter the practical application of First Amendment guarantees.

Admittedly, Emerson's ideas bring the interpretation of the First Amendment into a new context, that of classification. Nevertheless, they do not guide this process adequately. Nothing in this theory prevents the same considerations which underlie a balancing approach from determining the distinction between "speech and action;" the definition of "law and abridge," and delineation of the areas in which usual rights of expression do not operate. For example, suppression of the Communist Party could be justified on the grounds that the organization and operation of a political party constitutes action rather than speech. Although Emerson's concretization of his ideology advances civil liberties in specific instances, the same process, if undertaken by a scholar with different intuitions might yield opposite results.

Rationality Standard

The following paragraphs suggest a new theory of free speech, one that is libertarian enough to permit a wide scope for expression

and yet be sufficiently demanding to foreclose attrition by interpretation. The suggested doctrine is that all advocacy warrants unqualified protection, unless it is presented in such a context that the listener does not have an opportunity to rationally decide whether or not to heed the speaker's appeal. Although this test adequately applies to the straightforward assertion of unpopular or subversive opinions, it does not cover all types of advocacy, such as: (1) speech that is an integral part of a criminal act; (2) speech that conflicts with other provision of the Bill of Rights; and (3) speech that includes a substantial part of conduct.

Condition 1 poses no serious problems. Crimes may involve the use of speech or other forms of communication: orders may be given, plans laid, gunmen hired, etc., or expression may be used to bribe or defraud or swindle. Current doctrines recognize that such communications may be proscribed and few difficult cases arise.[9]

Condition 2 relates to the interface between privacy and free expression: two absolute rights cannot simultaneously exist. Some regulation of expression is necessary to maintian sanctity of our personal lives. The trade-off between privacy and free speech is so complex that general standards can hardly be given, except that there is now a far greater need to shield privacy from the government than from private individuals.

Condition 3 pertains to the indirect regulation of symbolic speech. Clearly, the government cannot give free reign to all forms of symbolic speech regardless of the conduct involved. This issue would need resolution by some type of Balancing Test.

All three conditions are simply an admission that not all free speech issues can be encompassed in a single comprehensive standard. Other special cases include freedom of religion, indirect controls on speech, and the regulation of public facilities.

Mind Control

One example of a special case, which would be banned under the rationality standard, is concerned with the practice of unconscious indoctrination. This of course is a form of subliminal manipulation, and in the past this process has taken place in some mind control classes, sessions, and seminars.

An unacceptable form of mental conditioning was displayed by trained employees of Mind Dynamics Corporation, a subsidiary of US Universal. The purpose of the course offered by Mind Dynamics was to train subscribers to take themselves into their "mental levels." During the training session, subscribers were put into a state of relative unconsciousness. While in this state, subjects were conditioned, without their knowledge or consent, to invest in Holiday Magic, Inc., another subsidiary of US Universal. This company was

selling distributorships--the equivalent of franchises--the sale of which, for a variety of reasons, was subsequently banned by the Federal Trade Commission.[10] They were fraudulently and deceptively sold.

To be legal under the Rationality Standard, the subject must know the purpose of the conditioning before it takes place. For example, a subject must first agree to unconsciousness conditioning for the purpose of giving up smoking if such conditioning is to take place under hypnosis. Any process of mental conditioning for a specific purpose must be known and agreed to by the patient or client before any such objective is pursued after the subject is in a state of relative unawareness.

Subliminal Advertising

Another special case, the illegal usage of subliminal perception devices, would also be banned under the Rationality Standard. One example of this would be the use of tachistoscopes. The tachistoscope was initially used in the 1960's to flash messages superimposed over motion pictures in theatres or upon film being transmitted through television. The highspeed messages were invisible to the conscious mind, but planted messages in the viewer's subconscious. These were designed to induce film viewers to buy products and in some cases they were effective. During one six week test of the tachistoscope in a movie theatre, involving 45,699 patrons, mes-

sages were flashed on alternate days: "Hungry? Eat Popcorn." and "Thirsty? Drink Coca-Cola." As a result of this test, popcorn sales increased 57,7% and Coca-Cola sales 18.1 % during that six week period.[11]

Another example of the usage of subliminal perception devices occurred shortly before Christmas in 1973, when it was called to the attention of the Federal Communications Commission that some television stations had broadcast an advertisement that contained the subliminal message: "Get It!" "Commission inquiry revealed that the NAB-TV Code Authority had learned of the use of the subliminal messages in late November and had received a statement from the advertising agency that it was dispatching telegrams to all stations to which the advertisements had been sent, informing them of the subliminal statements, authorizing the stations to delete the statements from the spots and informing the stations that film prints which did not contain the "Get It!" flashes would be sent to them... Despite the Code Authority's action, some stations apparently continued to broadcast spots containing the "Get It!" statement, and some state they have no record of having received the telegram from the agency.[12]

Then too, in March, 1976, Dr. Wilson Bryan Key in his statement before the Congressional Subcommittee on Alcoholism and Narcotics

alluded to many illegal usages of subliminal manipulation in the media. In one case, Key pointed out that he had several photographs from Time Magazine which according to him had the word "sex" embedded in them numerous times, (Figures 1 and 2). Key also stated that subliminal manipulation techniques had been employed in various political campaigns including one in the United States: "I looked at one Congressional campaign in the United States-right here in Arlington, Virginia. Subliminals were being used almost universally by the candidates. I think, in all fairness however, without the candidates' awareness. It is done by the advertising agencies as a standard production technique."[13] According to Key, an example of this occurred in the Rufus Philips' campaign posters where the word "sex" was again supposedly embedded, (Figure 3).

Such practices are manipulative and affect the citizen unconsciously in such a manner that he cannot rationally make a decision. It is in a sense a highly sophisticated form of brainwashing and should therefore be strictly controlled to protect the citizen.[14] It should be noted, furthermore, that in its Code the Federal Communication Commission has expressed only an aversion to, but not a law against, the usage of subliminal perception techniques or devices. However, it canneither police such activities realistically nor does it serve as an effective deterrent. Key, in his statement given be-

fore the Congressional Subcommittee on Alcoholism and Narcotics, clearly suggested how difficult it would be to police such activities:

> I do not know a reliable way to detect subliminals. I counseled the House of Commons in Ottawa that attempting to pass laws against this is almost absurd. There are ways I knows to circumvent any law that could be written. They would be unenforceable. The National Association of Radio and TV Broadcasting have a prohibition on subliminals in their code-which of course is not a law-which is unenforceable. Again, you would have to catch them and this is most difficult.[15]

It is still more unfortunate that only the Federal trade Commission is allowed to prosecute those who are caught using such illegal devices, and those who practice deceptive advertising techniques. In February 1977 the Director of the FTC Bureau of Consumer Protection was asked the following: "(1) What laws or ruling have been established against the usage of subliminal perception devices in advertising both for the screen and printed matter? (2) What effect has the ruling or law had on the prevention or deterrence of the practice? (3) How many cases involving the usage of subliminal perception devices have been tried by the Federal Trade Commission, and what were the results?" These questions produced the circular response from the FTC that: "There have not been any cases because there is no law against subliminal advertising...and there is no law against subliminal advertising because there have not been any cases."

Nevertheless, Wilson Bryan Key has documented in 1977 that incidents of subliminal advertising have not subsided. Quite certainly there is a danger as Earl Kintner suggests in his book A Primer on the Law of Deceptive Practices: "Production is no longer measured by consumer satisfaction. Moreover, the use of such deceptive techniques is not uncommon in the advertising field."[16]

While there is a significant need to curtail such forms of advertising, the FTC is reluctant to use its power of class reparations. Despite the fact that the FTC has the power to obtain class reparations, it seldom does, preferring in the vast majority of cases to opt for injunctive relief in order to spread its limited enforcement powers over a larger number of cases.[17] As a result its deterrent effect is substantially undermined.

Administrative agencies, such as the Securities and Exchange Commission and the Federal Trade Commission "do not have the tools available to remedy the many claims of persons injured". Thus a significant responsibility for the protection of the consumer is left to the private sector.[18] Governmental agencies usually have limited budgets and staffs, and are thus incapable of adequately protecting small claimants. Both the Federal Trade Commission and the Security Exchange Commission have experienced these problems in the past.[19] The government rarely has either the resources or the inclination to prosecute many of the actions that could be brought in the name of consumer protection.[20]

There are many reasons why a government agency may not institute a meritorious law suit. These include subtle or direct political influence, budgetary limitations, the policies and priorities of a particular administration, honest but erroneous interpretations of statutes and precidents, and simple bureaucratic inertia, incompetence or oversight.[21] Yet better business bureaus and other non-governmental groups, although successful in resolving relatively minor complaints, lack statutory enforcement authority. In contrast, those governmental agencies having enforcement authority are characteristically allocated limited funds and staff.[22] Consequently, there is respected opinion that neither administrative nor public agencies can adequately protect the consumer by their own enforcement powers.[23]

It has been implied that the US Supreme Court has not adopted a Rationality Standard for the First Amendment. While such a standard might permit a common law remedy against the use of subliminal advertising, without such a standard, any law abridging the right to employ subliminal advertising might very well be found to violate the First Amendment. In other words, the Canadian law which bars the use of subliminal advertising (the full text of which is given in Section Two) might be found unconstitutional based upon the First Amendment if it, or one similar to it, were passed in the US.

Aside from the First Amendment problems which a law against the usage of subliminal advertising might pose, and aside from the legal dilemmas which a Rationality Standard for the First Amendment might create in terms of any or all emotional speech and communication, in theory it might be worthwhile to consider some ways in which a ban on the usage of subliminal advertising might be enforced, short of the possible First Amendment limitations upon such an imposition.

Essentially, there are three ways in which a law against subliminal advertising might be implemented and enforced: (1) Through regulatory agency rulings or criminal laws to be enforced by regulatory agencies and/or law enforcement agencies; (2) Through civil laws which might be employed by a single plaintiff as a basis for private litigation; or (3) Through civil laws which would liberalize class action procedures as well as provide relief for each member of the class in private actions against the usage of subliminal advertising.

If law enforcement agencies are employed as an enforcement mechanism, a law should be passed making the usage of subliminal advertising a felony crime. Such a law enforced in this way would significantly improve the quality of life in the US, significantly reduce the promotion of unsafe products and services, significantly

reduce the chances that US citizens may someday be exploited through deceptive advertising by a potential or actual political dictator, and significantly increase the ability of American citizens to make rational decisions. The deterrent effect of law enforcement agencies investigating and prosecuting the usage of subliminal advertising as a felony crime would surely be substantial. Such a law would give law enforcement agencies significantly greater freedom in the investigation and/or prosecution of felony crime for it would expand their jurisdiction in a new area of substantial importance to the safety and security of US citizens.

The three enforcement measures suggested above are by no means mutually exclusive. In fact the usage of more than one would undoubtedly augment the deterrent effect.

Should such measures be ruled unconstitutional by virtue of the First Amendment, the publicity resulting from such a test case might well create sufficient momentum for the adoption of a constitutional amendment implementing the Rationality Standard insofar as it pertains to the usage of subliminal advertising and unconscious or subconscious mind control operations.

Conclusion

As noted before, the Rationality Standard is premised on libertarian arguments. Society, in order to promote its long term welfare and provide for individual fulfillment, should allow maximum scope for expression. It simultaneously recognizes that the community must protect itself from direct encroachment on its security. Given this dialect, the only restriction from speech that can be tolerated is

that which, because of its content and the circumstances of its delivery, provides the listener with no opportunity to rationally evaluate the speaker's words. Such expression may constitute a direct threat to law and order, and at the same time be virtually of no value for the development of the individual, the search for truth, or the preservation of democracy.

It relates to some extent to the promotion of change, but only insofar as it provokes violence; and when the forces of change operate at this level, society has the right and responsibility to protect itself. If a man advocates violence and an individual decides to heed such advice, the crime is clearly the responsibility of the listener. Only if the listener is unable to control himself, if he is moved to violence by forces beyond his control, such as a mob or riot, is the responsibility placed upon a speaker.

The suggested rule is sufficiently narrow to avoid the wide range of interpretations that reflect the prejudices of judges. Under its guidance, the rationale for limiting speech is not an assessment of public danger, which leaves great room for subjective opinion, but simply whether or not the nature or context of the speech preclude rational consideration.

This is strictly a question of fact, value judgments do not intrude. The judgment it requires is admittedly difficult, but it should be recalled that the only question is whether the listener has a reasonable amount of time to react rationally -not whether in

fact he did react rationally. Moreover, through expert testimony and the evolution of precedent, specific guidelines could be developed. Broadly conceived, the doctrine would do no more than prohibit incitement in a situation so emotionally charged that it would be unreasonable to expect a rational response from listeners. Aside from such special cases as deceptive advertising or manipulative subliminal advertising, individuals would be free to express any opinion, however noxious. Thus society would allow the advocacy of revolution but would draw the line at the actual inciting of violence.

The Rationality Standard is far more libertarian than those currently employed. It would mandate the repeal of virtually all statutes that punish for expression. These include the recently repealed Smith Act, which makes it illegal for any person to (1) knowingly or willfully advocate or teach the overthrow or destruction of any government in the United States by force or violence; (2) print, publish or disseminate written matter advocating such an overthrow; (3) participate in the organization of any group dedicated to such purposes; and (4) acquire and hold membership in such a group with knowledge of its purpose.

Also subject to repeal would be the McCarren Act, the act prohibiting counseling young men to resist the draft, the National Anti-Riot Act, and the numerous state statutes proscribing allegedly dangerous advocacy. Thus the range of First Amendment cases that could

be brought before a jury would be substantially curtailed. Moreover, if narrowly written law should survive judicial review, and cases be presented before juries, the jury would have to base its verdict in part on whether the conduct fits the factual context of the Rationality Test.

These guidelines would also prohibit civil disabilities based upon expression. It would require the repeal of loyalty oaths and loyalty investigations into First Amendment activities, as formerly conducted under the Communist Control Act.

Conclusion

The need for such a broadened interpretation of the First Amendment is not based solely on theoretical considerations; it derives as well from an analysis of our society, from an atmosphere of repression. America's often hysterical fear of radical upheaval and her distrust of strange ideas and practices has become institutionalized in a vast, impersonal bureaucracy that is armed with the most modern, intrusive technology. Moreover, the intolerance latent in the general public is constantly being stirred up by politicians seeking an easy way of election. Given this uncertain climate, the unscrupulous, deceptive system of legal safeguards becomes especially significant.

Freedom of speech is a broad area with constantly changing definitions and emphases. Encompassing everything from press, associa-

tion, expression, privacy, defamation, obscenity, nuisance, privilege, immunity, public access to the media, commercial speech, warranty limits on speech, and advertising, to equal protection, civil rights and political dissent, the issue to be determined remains the same. It is the question whether all forms of communication shall be permissible or what forms of communication shall be deemed impermissible. The answer to this dilemma is a matter of conscience, perception, philosophy and the law.

Because of the varying interpretations of the First Amendment, ranging from Bad-Tendency, Clear and Present Danger, Absolute and Balancing to Incitement and the Rationality Standard, the issue of constitutionality becomes a matter of will and perspective. This question can be answered only by a consideration of the specific elements of communication as they relate to society and government in light of the kind of society and government desired.

There is enough overlap of issues involved to make any determination of one specific example in isolation from the others moot and potentially invalid. For instance, the legitimacy or acceptability of subliminal advertising cannot be decided on the basis of its frequency or how serious a given occurrence might be. Requiring such criteria only explains why it took two world wars rather than one to succeed in dividing Germany and ending its military aggression; why it took publication of the Pentagon Papers to produce a law making the reproduction of classified documents illegal; and why

it took a Watergate to curtail the power of the presidency. In all of these cases, previous warnings fell on deaf ears and insufficient efforts were made to deter the harm before it was done.

Neither the frequency of cases occuring nor the magnitude of any given case should be the basis for determination of legitimacy when the issue involves the use of subliminal advertising. The potential for harming society is weighed against the benefits to society if the Balancing, Bad-Tendency or Clear and Present Danger Standards are employed, and the degree of action is considered if the Incitement or Absolute Tests are applied. In none of these instances is any clear standard involved. They are all based on degree and ambiguity. Only in the case of the Rationality Standard does the evaluation of acceptability of speech transcend any kind of weighing process or empirical consideration. It is not based on these criteria because such standards are too subjective as was suggested in the early pages of this chapter.

A far more valid speech standard is one in which the communication can be perceived by the listener or viewer. If it cannot be seen or heard consciously by the listener or viewer, it is unconstitutional per se. In this case, damages need not be proven for the Constitution has already been violated.

The advantage of such a free speech standard would not only be the curtailment of mind manipulation on the part of the sender and

involuntary action on the part of the receiver, but it would preserve society against dangers from which the other free speech standards were intended to protect society as well. Both government and industry would be deterred from using a number of devices with which to subvert the people without their knowledge or against their will. Such safeguards may not be necessary today, but surely they are desirable for their employment will result in no harmful side effects.

Footnotes

[1]Don R. Le Duc, "Free Speech Decisions and the Legal Process: The Judicial Opinion in Context," The Quarterly Journal of Speech (Oct. 1976), p. 287.

[2]Daniel M. Rohrer, Justice Before the Law (1971), pp. 223-229.

[3]Zechariah Chafee, Free Speech in the United States (1941), pp. 36-80

[4]Robert G. McCloskey, The American Supreme Court (1960), pp. 172, 178.

[5]Samuel Krislov, The Supreme Court and Political Freedom (1968), pp. 120-21.

[6]Thomas I. Emerson, Toward A General Theory of the First Amendment (1966), pp. 51-56.

[7]"Less Drastic Means and the First Amendment," Yale Law Journal (1969), pp. 462-72.

[8]Emerson, pp. 56-62.

[9]Ibid., p. 83.

[10]United States of America Before Federal Trade Commission; Docket No. 8834, "In the matter of Holiday Magic, Inc., a corporation and Willaim Penn Patrick, individually as Chairman of the Board of Directors of Holiday Magic, Inc., and Fred Pape and Janet Gillespie, individually." Initial Decision, Edgar A. Buttle, Administrative Law Judge (May 31, 1973), 1-407.

[11]Wilson Bryan Key, Subliminal Seduction (1973), pp. 22-23.

[12]"Subliminal Advertising," Federal Trade Regulation Reports, ¶50, 198 (Feb. 25, 1974).

[13]U.S. Congress, Senate, Committee On Labor and Public Welfare, Wilson Bryan Key, "Media Images of Alcohol: The Effects of Advertising and Other Media On Alcohol Abuse," 1976, (Hearings Before the Subcommittee On Alcoholism and Narcotics, Senate, 94th Congress, 2nd Session, March 11, 1976), pp. 179-82.

[14]Key, Subliminal Seduction, p. 22.

[15]Key, "Media Images of Alcohol: The Effects of Advertising and Other Media On Alcohol Abuse", pp. 179 & 182.

[16]Earl W. Kintner, A Primer on the Law of Deceptive Practices (1971), p. 2.

[17]Beverly Moore Jr., Class Action Reports (Second Quarter, 1974), p. 43.

[18]18 UCLA Law Review 1021 (1971).

[19]Creighton Law Review (1974), p. 506.

[20]18 UCLA Law Review 1021 (1971).

[21]Beverly Moore, Jr., Class Action Reports (Second Quarter, 1974) p. 45.

[22]26 University of Florida Law Review 58 (1973).

[23]J. Kelley, California Rural Legal Assistance Corporation Legal Services Center, Consumer Class Action Hearings (April 27, 1971), p. 89.